

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 13-1089

KIMBERLEE WILLIAMS, etc. et al.,
Appellants
v.

BASF CATALYSTS LLC; et al.

Transcript from the audio recording of
the oral argument held Thursday, March 13, 2014 at
the United States Courthouse, 601 Market Street,
Philadelphia, Pennsylvania. This transcript was
produced by James DeCrescenzo, a Fellow of the
Academy of Professional Reporters, a Registered
Diplomate Reporter, an Approved Reporter of the
United States District Court.

BEFORE:

THE HONORABLE THEODORE A. McKEE

THE HONORABLE THOMAS L. AMBRO

THE HONORABLE JULIO M. FUENTES

THIRD CIRCUIT, 3/13/2014

1 APPEARANCES:

2 JEFFREY M. POLLOCK, ESQUIRE
jmpollock@foxrothschild.com
3 FOX ROTHSCHILD
997 Lenox Drive
4 Princeton Pike Corporate Center
Building 3
5 Lawrenceville, New Jersey 08648
609.895.7660
6 Counsel for Appellants

7
8 EUGENE F. ASSAF, ESQUIRE
eugene.assaf@kirkland.com
9 KIRKLAND & ELLIS
655 15th Street, N.W.
10 Suite 1200
Washington, D.C. 20005
11 202.879.5196

12 And

13 KANNON K. SHANMUGAM, ESQUIRE
kshanmugam@wc.com
14 WILLIAMS & CONNOLLY
725 12th Street, N.W.
15 Washington, D.C. 20005
202.434.5050

16 And

17 ERIC TUNIS, ESQUIRE
etunis@greenbaumlaw.com
18 GREENBAUM, ROWE, SMITH & DAVIS
99 Wood Avenue South
19 Iselin, New Jersey 08830
20 732.476.2676
Counsel for Appellees
21
22
23
24

THIRD CIRCUIT, 3/13/2014

1 The question is is there a line? And
2 I think the answer is there is. The line would be
3 is it okay to take evidence and destroy it? To
4 talk about it --

5 THE COURT: Well that's different.
6 We're talking about fraud and you're talking about
7 spoliation.

8 MR. POLLOCK: Well, the question here
9 was fraud upon -- was the litigation privilege, how
10 broad is the litigation privilege. The litigation
11 privilege may, it may address the individual
12 representation by an individual, but does it really
13 go so far as to say if I collect evidence as part
14 of a plan, a conspiracy, because now you've got New
15 Jersey RICO triggered. Let's assume for the sake
16 of argument it is. That it is inappropriate for a
17 lawyer and a company to conspire to collect
18 evidence, destroy it and deceive the court.

19 You've got RICO, which is a remedial
20 statute, incredibly broad, and you've got the
21 litigation privilege saying an individual
22 representation, even if it's potentially wrong or
23 false, a few bad apples, as Judge Albin in essence
24 says, gets away. Those two issues are in conflict.

THIRD CIRCUIT, 3/13/2014

1 There has got to be a line where the
2 conduct, for example, of collecting that evidence
3 and conspiring about it, because otherwise it will
4 be open season on the courts. What people would
5 say, and Atlas clearly points out, there is some
6 point where the equitable power of this court to
7 stop fraud does step in.

8 And so to me the question that's right
9 here is that that individual statement perhaps, and
10 so to use our example, let's assume BASF --

11 THE COURT: Why can't the lawyers
12 say there is no asbestos in our talc product in
13 the course of litigation, in the course of
14 discovery, and why can't he say that? And if he
15 says it why isn't he entitled to the litigation
16 privilege because they are words uttered in the
17 course of litigation?

18 MR. POLLOCK: I think to put a fine
19 point on it --

20 THE COURT: It's separate from the
21 spoliation issue that you were discussing before.

22 MR. POLLOCK: I think they're
23 intertwined and here's how I think they're
24 intertwined.

THIRD CIRCUIT, 3/13/2014

1 If BASF and Cahill Gordon have a
2 case in Wichita, Kansas and they have a guy, they
3 hire local counsel and they say John, there's no
4 asbestos in our talc, file a motion to dismiss.
5 John walks in and files a motion to dismiss.

6 I agree with you he is absolutely
7 immune under the litigation privilege. Whether
8 that statement is false or not, he is protected
9 because he believes it to be true, et cetera.

10 THE COURT: Well, that's the key.
11 You're putting a rabbit in the hat with this
12 hypothetical. The issue here is -- because that's
13 not even fraud because there's no scienter.

14 MR. POLLOCK: Exactly right. So now,
15 and Judge, Chief Judge McKee, what I was going to
16 is then take the next step. Is it a difference
17 that makes a difference if Cahill Gordon walks in,
18 knowing that it was false, because now you've got
19 the action of conspiracy and you've got the
20 statement. Is that a difference that makes a
21 difference?

22 The litigation privilege under Loigman
23 says hey, as to that individual representation
24 maybe it's not a problem, I can go ahead and lie

THIRD CIRCUIT, 3/13/2014

CERTIFICATION

I, JAMES DeCRESCENZO, a Registered
Diplomate Reporter, Certified Realtime Reporter,
Certified Shorthand Reporter of New Jersey, License
Number XI 00807, and Notary Public, hereby certify
that the foregoing is a true and accurate
transcript.

I further certify that I am neither
attorney nor counsel for, not related to nor
employed by any of the parties to this action; and
further, that I am not a relative or employee of
any attorney or counsel employed in this action,
nor am I financially interested in this case.



James DeCrescenzo
Registered Diplomate Reporter
Certified Shorthand Reporter Notary Public